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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 2002

PETER PAUL MITRANO,

Petitioner,

versus

VIRGINIA LEE KELLY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

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PETITION FOR WRIT OF CERTIORARI

Peter Paul Mitrano
Pro se
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

June 2003

8 pp

Questions Presented for Review

1. Whether the State of Vermont erred in dismissing on the basis of a Rule 12(b)(6) a petition to enforce a child custody order (from the Commonwealth of Virginia) pursuant to Title 28, United States Code, Section 1738A?

2. Does Title 28, United States Code, Section 1738A preempt the State of Vermont from awarding attorney's fees for the denial of an order to enforce a child custody order (from the Commonwealth of Virginia) pursuant to Title 28, United States Code, Section 1738A?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the Supreme Court of the State of Vermont. Neither party is a parent, subsidiary or affiliate of any company.

Table of Contents

Questions Presented i

Parties to Proceedings ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Petition 8

Conclusion 30

Appendices

Entry Order of the Supreme Court of the State of Vermont A-1

Entry Order of the Supreme Court of the State of Vermont A-10

Entry Order of the Supreme Court of the State of Vermont A-18

Opinion and Order of the State of Vermont Windsor County, SS. A-19

Decision and Order of the State of Vermont Windsor County, SS. A-28

Title 23, United States Code, Section 1738A A-32

Emergency Petition for Enforcement of the Attached Custody Order A-36

Table of Authorities

Andrews v. *Geyer*, 200 Va. 107,
104 S.E.2d 747 (1958) 22
Badwell v. *Brooks*, 141 N.H. 508,
686 A.2d 1179 (1996) 21
Clarke v. *Clarke*, 126 N.H. 753,
496 A.2d 361 (1985) 15-16
Eichelberger v. *Eichelberger*, 2 Va.App.
409, 345 S.E.2d 10 (1986) 22
Ex Parte Raywood, 549 So.2d 103
(Ala. 1989) 23
F.D. Rich Co. v. *Industrial Lumber
Co.*, 417 U.S. 116 (1974) 30
Fogerty v. *Fantasy, Inc.*,
510 U.S. 517 (1994) 30
Howard v. *Howard*, 124 N.H. 267,
469 A2d. 1318(1983) 16
In re the Marriage of Hubbard,
315 N.W.2d 75 (Iowa 1982) 17
In re Marriage of Leyda,
398 N.W.2d 815 (Iowa 1987) 21-22
Joel M. v. *Karen M.*,
507 N.Y.S.2d 369 (1986) 24
Johnson v. *Johnson*, 26 Va. App. 135,
493 S.E.2d 668 (1997) 18, 22-23
Matter of Guardianship of Walling,
727 P.2d 586 (Okl. 1986) 20
Meade v. *Meade*, 650 F.Supp. 205 (N.C.
1986), *aff'd* 812 F.2d 1473 (4th Cir. 1987) . . . 12
Mebert v. *Mebert*,
444 N.Y.S.2d 834 (1981) 25-26
Mitrano v. *Kelly*, 534 U.S. 1115 (2002) 7, 29
Mitrano v. *Kelly*, 123 S.Ct. 978 (2003) 29

Table of Authorities
(Continued)

Mitrano v. *Kelly*, 123 S.Ct. 1617 (2003) 29
Mitrano v. *Martin*, 123 S.Ct. 976 (2003) 29
Moore v. *East Cleveland*,
431 U.S. 494 (1977) 29
Neger v. *Neger*, 93 N.J. 15,
459 A.2d 628 (1983) 17
Rocissono v. *Spkes*, 170 Vt. 309,
749 A.2d 592 (2000) 16
Sherry Ann F. v. *Bennet S.*, 131 Misc.2d
854, 502 N.Y.S.2d 383 (1986) 24
Shute v. *Shute*, 158 Vt. 242,
607 A.2d 890 (1992) 19
St. Andrie v. *St. Andrie*,
473 So.2d 140 (La. 1985) 18
State Ex Rel. Conforti v. *Wilson*,
203 W.Va. 21, 506 S.E.2d 58 (1998) 18-19
Thompson v. *Thompson*,
484 U.S. 174 (1988) 11, 12

Other Authorities:

32 Family Law Quarterly 267
(1998) 12, 17, 18
45 Hastings L.J. 1329, 1344
(July 1994) 18
Section 20-108 of the
Code of Virginia 11
Title 28 of the United States Code,
Section 1738A . . . . . (Cited throughout.)
Uniform Child-Custody Jurisdiction and
Enforcement Act 12, 20

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---

Peter Paul Mitrano respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Vermont in this case.

Opinions Below

The decisions of the Supreme Court of the State of Vermont from which petitioner seeks certiorari appears hereto at pages A-1 and A-10, respectfully. The Judgment Orders of the trial court, the Vermont Family Court, Windsor County, also appear hereto at pages A-19 and A-27, respectfully. All lower court decisions are unreported.

Jurisdiction

The decision of the Supreme Court of the State of Vermont was entered on March 27, 2003. (A-1) This petition for writ of certiorari was filed within ninety days of said date of March 27, 2003. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(a).

Statutory Provision Involved

Title 28, U.S.C., § 1738A is reprinted in its entirety at A-31. The pertinent language is:

> "(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State."

Statement of the Case

This petition for writ of certiorari arises from the filing on January 9, 2001 of an Emergency Petition for Enforcement of a Custody Order that was filed by the petitioner, Peter Paul Mitrano (hereinafter sometimes referred to as the "father"). (A-35) The action was dismissed by the trial court for failing to state a claim on the basis of a 12(b)(6) ruling. (A-27) The Supreme Court of the State of Vermont affirmed said dismissal. (A-

10) The father claims that he is entitled to the custody of the parties' minor children pursuant to the custody order (from the Commonwealth of Virginia dated 1992) (A-40) pursuant to Title 28, United States Code, Section 1738A. The respondent, Virginia Lee Kelly (hereinafter sometimes referred to as the "mother") claims that she is entitled to the custody of the parties' minor children despite said custody order.

The mother has denied the father access to even see his three children since January 5, 2001. The relevant facts are that the Commonwealth of Virginia entered a fully-litigated custody order stating "that the minor children of the parties shall reside primarily with" the father in compliance with Title 28, United States Code, Section 1738A on September 4, 1992. Since at least September 4, 1992 until at least October 1, 2000, the minor children of the parties had resided primarily with the father.

Beginning since at least October 6, 2000, the children had lived with their mother in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. (A-37) Accordingly, when the mother filed a petition to modify a custody order in the State of New Hampshire on October 16, 2000 (and prior thereto), the children were living in both the State of Vermont and the State of New Hampshire.

The custody Order of the Circuit Court of Fairfax County, Virginia states in part that the parties "shall have joint physical and legal custody of their minor children". (A-41) Thus, while the mother was exercising her joint physical and legal custody of their minor children and living in the State of Vermont, said minor children were living in the State of Vermont. Because the mother was living with the three children of the parties in the State of Vermont in October 2000 prior to the filing by the mother of her Ex Parte Petition to Bring Cause Forward and Modify on October 16, 2000, the State of New Hampshire was not a "home State" as defined by 28 U.S.C., 1738A(b)(4) on October 16, 2000. Accordingly, it is clear that the State of New Hampshire was not a "home State" of the children "on the date of the commencement of the proceeding". Also see 28 U.S.C., § 1738A(c)(2)(A)(i).

The father left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant (a "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child") living in the State of New Hampshire at the end of day of December 20, 2000. Their daughter, Christina, had been unlawfully living with her mother in the State of Vermont. Their sons, Peter and Christopher, were living in the Commonwealth of Virginia with their father until the mother unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under her right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia.

Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant 28 U.S.C., § 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

Any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject matter jurisdiction. Title 28 U.S.C., § 1738A(c)(2)(A)(ii) requires that **"a contestant continues to live in such State"**. It is clear that no contestant continued to live in the State of New Hampshire after December 20, 2000 until at least the end of January 2001.

The father contends that all facts stated in his Emergency Petition for Enforcement of the Attached Custody Order (A-35) are deemed true for the purpose of deciding whether the motion to dismiss should have granted; even so, as a protective measure and out of an abundance of caution, the father notes that these facts were not contested by the mother. In paragraph numbered 2 of the Emergency Petition for Enforcement of the Attached Custody Order, the father stated in part that:

> ". . . The respondent, Virginia Lee Kelly, resides at Newton Lane, Norwich, Vermont 05055. The respondent, Virginia Lee Kelly, receives mail at the address of Post Office Box 1248, Norwich, Vermont 05055." (A-38)

In paragraph numbered 6 of the Emergency Petition for Enforcement of the Attached Custody Order, the father stated that:

> ". . . Since October 6, 2000, the children have lived with the respondent in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, prior to the date of a filing of petition to modify a custody order in the State of New Hampshire which was October 16, 2000 and on October 16, 2000, the children were living in both the State of Vermont and the State of New Hampshire . . . ." (A-37)

Moreover, some of the more critical facts stated by the father in his Emergency Petition for Enforcement of the Attached Custody Order that are deemed to be true are as follows:

> "5. . . . After the petitioner produced Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) for visitation in Fairfax, Virginia, the respondent failed to return the children to petitioner in accordance with the attached custody Order of the Circuit Court of Fairfax County, Virginia . . .
>
> "6. **The petitioner denies that the State of New Hampshire has jurisdiction to determine custody of said children pursuant to Title 28 of the United States Code, Section 1738A.** Petitioner

> further states that as of the end of the day of December 20, 2000, neither the petitioner, respondent nor any of the parties' children have lived in the State of New Hampshire . . ." (Bold emphasis added.) (A-36—A-37)

The above clearly establishes that the father has stated a cause of action because (1) there exists the valid custody order (from the Commonwealth of Virginia dated 1992); (2) 28 U.S.C., § 1738A provides that the trial court was required to enforce said valid custody order from the Commonwealth of Virginia; and (3) the mother and children were living in the State of Vermont at time the father's petition was filed.

Procedurally, on January 9, 2001, the Emergency Petition for Enforcement of a Custody Order was filed at the trial court. (A-35) The trial court dismissed said Emergency Petition for Enforcement of a Custody Order on January 23, 2001. (A-27) Thereafter, the Supreme Court of the State of Vermont affirmed said decision except that Supreme Court of the State of Vermont remanded an issue of attorney fees to the trial court. (A-10) This Supreme Court of the United States previously denied petitioner's writ of certiorari related to said decision of the Supreme Court of the State of Vermont in *Mitrano* v. *Kelly*, 534 U.S. 1115 (2002). Thereafter, the trial court issued another decision (A-19) which the Supreme Court of the State of Vermont affirmed on March 27, 2003 except that the Supreme Court of the State of Vermont remanded another issue of attorney's fees to the trial court. (A-1)

Reasons for Granting the Writ

In the instant action, the petitioner was in essence thrown out the door of the courthouse without even a hearing on the purported basis on a Rule 12(b)(6) decision. This case involves important questions of law as to the interpretation of 28 U.S.C., § 1738A which has been improperly interpreted by the States, which has not been, but should be settled by this Supreme Court. The failure of the State of Vermont to enforce the subject custody order has caused great turmoil in the children's lives. All over the United States of America, children's lives are disrupted by the failure of the state courts to follow the subject federal law.

By and through violations of 28 U.S.C., § 1738A by the various States and the erroneous interpretations of 28 U.S.C., § 1738A by the various state courts, the respondent has denied the petitioner his right to even see his children since January 5, 2001. In summary, the respondent first violated 28 U.S.C., § 1738A(e) by obtaining an ex parte order on October 16, 2000 that in effect took away petitioner's daughter. This ex parte order was issued in the State of New Hampshire. Thereafter, on December 20, 2000, the petitioner believing that he was not going to obtain any justice in the State of New Hampshire, left the State of New Hampshire and moved into the Commonwealth of Virginia on December 21, 2000. On or prior to October 1, 2000, the respondent had left the State of New Hampshire and moved into the State of Vermont. Therefor, at the end of the day of December 20, 2000, no

one was left living in the State of New Hampshire. Pursuant to 28 U.S.C., § 1738A(c)(2)(A)(ii), the State of New Hampshire no longer had subject matter jurisdiction after December 20, 2000. Furthermore, on the date of the October 16, 200 order, the children had no "home State" because the children had been living in both the State of Vermont and the State of New Hampshire. Accordingly, any orders from the State of New Hampshire after December 20, 2000 are void because of lack of subject matter jurisdiction. Thereafter, on January 3, 2001, the respondent again violated 28 U.S.C., § 1738A(e) by obtaining another an ex parte order that in effect took away petitioner's two sons. This ex parte order was also issued in the State of New Hampshire after the State of New Hampshire no longer had subject matter jurisdiction. Thereafter on January 5 and 8, 2001, the courts in the Commonwealth of Virginia refused to rule on the merits of two motions because of an alleged lack of notice, and erroneously stated that the void ex parte order dated January 3, 2001 from the State of New Hampshire, was a "facially valid custody order". Thereafter, on January 9, 2001, the petitioner filed the subject motion to enforce the custody order from the Commonwealth of Virginia in the State of Vermont. On January 23, 2001, the trial court in the State of Vermont dismissed said motion to enforce on the basis of a Rule 12(b)(6) motion and at the same time relied upon facts outside of said motion to enforce. Thereafter, the Supreme Court of the State of Vermont affirmed said motion to dismiss. The above is explained in more detail hereinafter.

1. Whether the State of Vermont erred in dismissing on the basis of a Rule 12(b)(6) a petition to enforce a child custody order (from the Commonwealth of Virginia) pursuant to Title 28, United States Code, Section 1738A?

The Supreme Court of the State of Vermont committed error in its decision that the father failed to state a claim upon which relief may be granted. The Supreme Court of the State of Vermont relied upon allegations outside of the four corners of the Emergency Petition for Enforcement of a Custody Order. (A-10)

Title 28, U.S.C., § 1738A does not require the State of Vermont to be a "home State" to enforce the custody order from the Commonwealth of Virginia. In fact, the words **"shall enforce"** are mandatory words as opposed to "may-like" permissive language. Title 28, U.S.C., § 1738A states in pertinent part that:

> "(a) **The appropriate authorities of every State shall enforce according to its terms**, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." (Bold emphasis added.)

Pursuant to said above-quoted language of 28 U.S.C., § 1738A, the father is respectfully requesting that this Supreme Court remand this matter to the Supreme Court of the State of Vermont with instructions to remand this matter to the trial court for a decision on the merits with

instructions to enforce the custody order of the Circuit Court of Fairfax County, Virginia (A-40) attached to the father's emergency petition for enforcement.

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that the Commonwealth of Virginia "made a child custody or visitation determination" consistent "with the provisions of" 28 U.S.C., § 1738A. Section 20-108 of the Code of Virginia provides that the Commonwealth of Virginia shall continue to have jurisdiction over the custody order of the Circuit Court of Fairfax County, Virginia. The father currently is a resident of the Commonwealth of Virginia. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. The Commonwealth of Virginia has continuing jurisdiction pursuant to 28 U.S.C., §§ 1738A(c)(2)(E) and 1738A(d). 28 U.S.C., § 1738A(d) states that:

> "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

In *Thompson* v. *Thompson*, 484 U.S. 174 (1988) this Court ruled that 28 U.S.C., § 1738A is only a full faith and credit statute and does not create a federal right of action.

Also see *Meade* v. *Meade*, 650 F.Supp. 205, 210 (N.C. 1986), *affirmed* 812 F.2d 1473 (4th Cir. 1987), which was decided prior to *Thompson* v. *Thompson, supra*, wherein the court stated in part that:

> ". . . Thus North Carolina is under a federal duty to enforce the decree according to its terms and acted improperly in modifying Virginia's initial decree."

The Commonwealth of Virginia clearly had jurisdiction pursuant to 28 U.S.C., § 1738A at the time the custody order that is attached to the father's emergency petition for enforcement was issued. The father therefore contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon the father's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said UCCJEA, 28 U.S.C., § 1738A clearly provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction.

On January 8, 2001, the father after giving verbal notice to the attorney for the mother, filed an Emergency Petition for Enforcement of the Custody Order in the Circuit Court in Fairfax,

Virginia. The court denied said petition. The trial judges stated in the Trial Judges' Corrected Statement of Facts Filed Pursuant to Rule 5:11 [Rules of Virginia Supreme Court]:

> "TRIAL JUDGES' CORRECTED STATEMENT OF FACTS FILED PURSUANT TO RULE 5:11
>
> "Come Now, Henry E. Hudson and Jane Marum Roush, Judges of this Circuit Court, and after review of the Petitioner's WRITTEN STATEMENT IN LIEU OF TRANSCRIPT, certifies as follows:

1. This case was heard on two occasions by separate judges of this Court on the Petitioner's motions for an emergency child custody hearing. In **neither instance did the trial judge conclude that a genuine emergency existed**, justifying an immediate hearing without customary notice to the Defendant.
2. On January 5, 2001, Petitioner presented a 'Petition for Emergency Order' to Judge Henry E. Hudson sitting in chambers. Telephone contact was made with counsel for the Defendant. Upon learning that the children in question had been in the jurisdiction for less than two weeks and that a **facially valid custody** order issued by a court in New Hampshire was in existence, the court denied the Petitioner's motion. The Petitioner presented no other

emergent facts or circumstances, other than that the deadline for returning his children to the Defendant under the New Hampshire order was imminent. In essence, the Petitioner's motion was a request for change of custody. **The Court made no decision on the merits of that request.**

3. On January 8, 2001, the Petitioner appeared ex parte before Judge Jane Marum Roush, sitting in chambers, with a similar 'Emergency Petition for Enforcement of the Custody Order.' The petition had been denied earlier that afternoon by Judge Valentine of the Fairfax County Juvenile and Domestic Relations Court. Defendant's counsel was not notified by plaintiff that he was seeking relief from Judge Valentine's order in the Circuit Court. Judge Roush conferred with Judge Valentine and Judge Hudson and denied the Emergency Petition. Judge Roush advised plaintiff that New Hampshire had jurisdiction in this matter. Defendant's counsel was notified by telephone of Judge Roush's ruling. See Calendar Control Form dated January 8, 2001.

4. Aside from Petitioner's motions for emergency relief, no other motion for modification of custody has been filed

in this Circuit Court. (Bold emphasis added.)

"The Clerk is requested to send copies of this certification to the Petitioner pro se and to counsel for the Defendant.

"Respectfully submitted this 7th day of March 2001.

_____/s/_____
Henry E. Hudson, Judge

_____/s/_____
Jane Marum Roush, Judge"

The courts in the Commonwealth of Virginia did not decline jurisdiction pursuant to 28 U.S.C., § 1738A(f)(2), the courts in the Commonwealth of Virginia only erroneously stated in dicta that New Hampshire had jurisdiction based upon a "facially valid custody order". Judge Hudson stated that he was not going to read the pleadings the father submitted with his petition and did not read said pleadings prior to denying the father's petition. Note that contrary to the above statement that "Defendant's counsel was not notified by plaintiff that he was seeking relief from Judge Valentine's order in the Circuit Court", petitioner did in fact in person verbally advise respondent's counsel, Christopher W. Schinstock, Esquire, immediately prior thereto that petitioner was going to present said petition to the Circuit Court in Fairfax, Virginia.

Another case discussing this issue is *Clarke* v. *Clarke*, 126 N.H. 753, 755, 758, 496 A.2d 361, 363, 365 (1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.)
>
> . . .
>
> ". . . Unless there has been a final order by an out-of-state court declining jurisdiction to modify its custody decree, the courts of New Hampshire will not assume jurisdiction to modify such a decree . . . ."

In addition to the trial court in the State of New Hampshire not following the above-quoted language from its own Supreme Court of New Hampshire, said trial court also ignored the language in *Howard* v. *Howard*, 124 N.H. 267, 273-274, 469 A.2d 1318, 1322 (1983) that temporary changes after a permanent change are not to granted absent exceptional cases. Said trial court also ignored its RSA 458-A:21 that required said trial court to obtain the court file of the original custody dispute in the Commonwealth of Virginia. The Supreme Court of Vermont committed error as a matter of law in interpreting 28 U.S.C., § 1738A as to when subject matter jurisdiction was to be determined. See the reliance on *Rocissono* v. *Spkes*, 170 Vt. 309, 313, 749 A.2d 592, 596 (2000). (A-14).

Moreover, the State of New Hampshire was not a "home State" on the dates that the mother filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in the State of Vermont

part of the time with the mother prior to the filing of the petitions. In *Neger* v. *Neger*, 93 N.J. 15, 32-33, 459 A.2d 628, 637-638 (1983), the court stated:

> "As noted previously, the plaintiff and defendant had arranged for alternating physical custody of Carly . . . This record does not satisfy the statutory six-consecutive-month requirement. Carly had not lived with her father in California for six consecutive months 'within six months before commencement of the proceeding' involving custody in the California court . . . A contention that Carly's absence from New Jersey was temporary and therefore should not be counted as part of a six-month period assumes that residing with her father was only a visit. **However, the arrangement here was not truly characteristic of a visit, but consisted of fixed substantial periods of time in a regular alternating manner unrelated to holidays or vacations. It is possible, of course, that there may be no home state.** *See, e.g., In re the Marriage of Hubbard*, 315 N.W.2d 75 (Iowa 1982) (after Iowa divorce in 1976 in which mother was awarded custody of three children, mother and children moved so frequently before custody modification instituted in Iowa in 1979, that there was no 'home state')." (Bold emphasis added.)

Also see *Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997), wherein this Court stated:

> "In the instant case, during the time immediately preceding both the divorce decree and the consent decree of December 1993, the child spent short periods alternatively with each parent, resulting in an equal division of her time between Virginia and New York. **At that time, the child had no single home state under the UCCJA definition** . . . ." (Bold emphasis added.)

In *St. Andrie* v. *St. Andrie*, 473 So.2d 140, 144 (La. 1985), the court also found that the child had no home state when the child lived in two different states pursuant to the agreement of the parents, the court explained the situation and stated:

> "Analyzing the situation before the court under the 'home state' standard, during the six-month period prior to the institution of the custody proceeding . . . the child was in fact shuttled back and forth between Georgia and Louisiana every few months. Therefore, **it is clear that the child has no 'home state'**." (Bold emphasis added.)

Also see 45 Hastings L.J. 1329, 1344 (July 1994) wherein it is noted that "A child in a joint custody situation might have two established homes."

The court ruled in *State Ex Rel. Conforti* v. *Wilson*, 203 W.Va. 21, 25, 506 S.E.2d 58, 62 (1998) that "[n]aturally, **as a federal**

jurisdictional statute, the PKPA preempts the UCCJA by virtue of the Supremacy Clause. (Citation omitted)" (Bold emphasis added.) *Also see Shute* v. *Shute*, 158 Vt. 242, 247, 607 A.2d 890, 893 (1992), wherein the court ruled that the PKPA preempts the UCCJA and/or the state statutes whenever there is a conflict between the same as to which state has subject matter jurisdiction concerning child custody.

Because the State of New Hampshire was not a "home State" on the dates the petitions were filed by the mother, the interpretation of the following language contained in 28 U.S.C., 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, **or** (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, **and a contestant continues to live in such State**;" (Bold emphasis added.)

Note that in interpreting the language "**and a contestant continues to live in such State**", this Court must also consider the statute as a whole. Note that the language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of 28 U.S.C., § 1738A(c)(2)(A). Also note the difference in words contained in 28 U.S.C., § 1738A(d) that "such

State remains the residence of the child or of any contestant". Thus in interpreting the language **"and a contestant continues to live in such State"**, this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all the contestants stopped living in the State of New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court discussed the language stated above and stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable **because of the requirement of having a 'person acting as parent' continued to live in the state** . . ." (Bold emphasis added.)

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of 28 U.S.C., § 1738A provides that jurisdiction is lost by all parties moving out of the state prior to the

conclusion of the proceedings under 28 U.S.C., § 1738A(c)(2)(A)(ii).

Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject matter jurisdiction pursuant to 28 U.S.C., § 1738A. *Also see Badwell* v. *Brooks*, 141 N.H. 508, 512, 686 A.2d 1179, 1182 (1996) ("court's jurisdiction to award custody is purely statutory").

Note also that 28 U.S.C., § 1738A(c)(2)(B) does not apply because the Commonwealth of Virginia had prior jurisdiction under 28 U.S.C., § 1738A(c)(2)(A). Also see 32 Family Law Quarterly 267, 278 (1998), wherein it is stated:

> "In contrast, the PKPA seeks to limit the exercise of **initial custody jurisdiction** to the home state, if there is one. It does this **by prioritizing home state jurisdiction over significant connection jurisdiction**. [Footnote: 28 U.S.C. § 1738A(c)(2)(A) and (B).]" (Bold emphasis added.)

Also note that in the case of *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987), the court stated:

> ". . . The provisions of this federal legislation indicate a congressional intent that the act be applied in all interstate custody disputes. State courts considering the question have held the federal legislation preempts state law in determining when jurisdiction may be exercised in interstate custody matters. (Citations omitted.) **The**

> **federal statute uses language more specific than the UCCJA in limiting modification jurisdiction** . . . ."
> (Bold emphasis added.)

The interpretation of 28 U.S.C., § 1738A is a question of law. The State of New Hampshire clearly did not have subject matter jurisdiction to modify the custody order from the Commonwealth of Virginia. The language of 28 U.S.C., § 1738A provides clearly that the trial court in the State of Vermont must enforce the custody order from the Commonwealth of Virginia. In *Eichelberger* v. *Eichelberger*, 2 Va.App. 409, 412, 345 S.E.2d 10, 12 (1986), the court ruled:

> "Once a court has ruled on matters relating to the custody and care of minor children, and visitation rights of the noncustodial parent, the court retains jurisdiction throughout the minority status of the child involved. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747, 751 (1958) . . . ."

It is important to note that the mother has wrongfully failed to return the two boys to the father after her scheduled visitation ended on Monday, January 8, 2001. The father has not seen any of his three children since January 5, 2001. As the court stated in *Johnson* v. *Johnson*, 26 Va. App. 135, 146, 149, 493 S.E.2d 668, 673, 674 (1997):

> "A party must obey an existing custody order until a modification order supersedes it. '[T]he custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless

> and until that determination is modified pursuant to law.' Code § 20-135.
>
> . . .
>
> ". . . Here mother violated a custody agreement by wrongfully retaining her child after her period of physical custody concluded. In both cases, **the violating parent gained a 'tactical advantage by his conduct.'"** (Citation omitted.) (Bold emphasis added.)

Arguendo, even if New Hampshire had jurisdiction under 28 U.S.C., § 1738A (which the father steadfastly denies), the ex parte New Hampshire order dated January 3, 2001 that dealt with the other children of the parties would be void because no notice whatsoever was given as required under 28 U.S.C., § 1738A. 28 U.S.C., § 1738A(e) states:

> "(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child."

In addition, as of January 3, 2003, the State of New Hampshire had not had any contact with the Commonwealth of Virginia prior to the entry of any orders that the State of New Hampshire had entered. See *Ex Parte Raywood*, 549 So.2d 103, 104 (Ala. 1989) wherein the court stated: "we find that the Louisiana ex parte order was not made

consistently with the PKPA and is not entitled to full faith and credit by the courts of Alabama"; also *see Joel M.* v. *Karen M.*, 507 N.Y.S.2d 369, 371 (1986) wherein the court stated:

> "The sole issue presented in this enforcement proceeding is whether or not the Superior Court of the State of New Hampshire in making the ex parte temporary order of custody was exercising jurisdiction substantially in conformity with the PKPA and UCCJA. Because neither the respondent-mother nor the respondent-maternal grandmother who has physical custody of the children were afforded any notice whatsoever—much less an opportunity to be heard, this Court holds and determines that the New Hampshire ex parte order dated October 2, 1986 is not entitled to full faith and credit under the PKPA or the UCCJA. (See *Sherry Ann F.* v. *Bennet S.*, 131 Misc.2d 854, 502 N.Y.S.2d 383 (Fam.Ct., Scho.Co., 1986))."

Accordingly, because it is clear that the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under 28 U.S.C., § 1738A (even if New Hampshire had jurisdiction under 28 U.S.C., § 1738A which the father steadfastly denies), the mother wrongfully failed to return the two boys after her scheduled visitation to the father on Monday, January 8, 2001.

Immediately thereafter, on January 9, 2001, the father filed his Emergency Petition for Enforcement of a Custody Order before the trial court (A-35) in the State of Vermont. Because the ex parte New Hampshire order dated January 3, 2001 is not entitled to full faith and credit under 28 U.S.C., § 1738A, the trial court in the Commonwealth of Virginia erred in ruling that said New Hampshire order dated January 3, 2001 should be followed.

In this action, the father is only attempting to enforce the custody order and not modify or change the terms of the custody order that is attached to the father's emergency petition for enforcement of the subject custody order. Moreover, it is not necessary for the State of Vermont to be a "home State" to enforce the custody order that is attached to the father's emergency petition for enforcement of the subject custody order. Therefore, any assertions that the trial court in the State of Vermont and/or any other court may not proceed with an enforcement action (as opposed to a "proceeding for a custody or visitation determination") are clearly without merit. See 28 U.S.C., § 1738A.

Note that in *Mebert* v. *Mebert*, 444 N.Y.S.2d 834, 837 (1981), the court emphasized that the jurisdictional requirements must be met:

> "It is true that even though the Supreme Court had both the personal jurisdiction necessary to enter a decree of divorce, it may have lacked the subject matter jurisdiction necessary to make a custody determination. (Citation omitted.)

. . .

> ". . . From its plain meaning of the statute (Citations omitted) **this court must conclude that under the federal law the best interest of the child can not be looked at in a custody matter unless the jurisdictional prerequisites set forth in the federal statute are met**, including the requirement that the child 'immediately preceding the time involved' must have lived in this state with one of its parents for at least six consecutive months. (Citation omitted.) (Bold emphasis added.)

Another reason not to recognize the New Hampshire orders are that said orders are the result of sham proceedings in that the very least there is a willful failure of the Lebanon Family Division to follow the controlling law. The Lebanon Family Division in the State of New Hampshire refuses to recognize the father's right to basic due process under the constitutions of the United States of America and the State of New Hampshire. The state court in New Hampshire is the legal equivalent of a bottomless black hell hole wherein said court has (1) taken away petitioner's children all initially on an ex parte basis; (2) unlawfully held the petitioner in contempt of court for moving with his sons out of the State of New Hampshire; (3) refused to allow the petitioner to call any witnesses to the stand at an alleged hearing in April 2001; and (4) repeatedly denied the petitioner other forms of due process.

The courts in the State of Vermont clearly committed error in refusing to enforce the subject custody order; clearly, the State of Vermont had jurisdiction to make a ruling as to whether or not to enforce the subject custody order when all the children and the mother were physically living in the State of Vermont. The father has clearly been denied his lawful custody of his children even though the father has done nothing wrong. The father is not a "potted plant" who is required to sit in the State of New Hampshire while the State of New Hampshire violates the federal laws of the United States of America along with the father's rights and liberties. The father has not been permitted to even see his children since January 5, 2001.

In passing, this Supreme Court should note that it is becoming abundantly clear that there is a crisis of failed marriages (between a man and a woman) in this country and a resulting crisis related to the children of said marriages. This Supreme Court should ask if the courts are to partially blame for the same by providing financial incentives to abandon marriages. Note a recent letter in the *Boston Sunday Globe*, June 8, 2003, page C2 that states:

> "In divorce, look at inequality toward men
>
> "I have to disagree with a recent article ('In hard times, bitter divorces,' May 29) about the cause of the upswing in litigation. I believe it has more to do with the inequality men face in Probate Court as it

pertains to physical custody, visitation and child support.

"Massachusetts has the highest child-support costs in the country, at nearly twice the nation's average. For fathers who remain in their children's lives, child support is based on income versus the cost of raising a child. Yet the state sets a fixed rate of a little more that a $100 a week to cover the cost of raising a child in foster care.

"Here, the first $20,000 of a woman's income is not accounted for in calculating her assets.

"There is no such provision for men. On average men pay a third to half of their income for child support. There is no law that guarantees child support will go to the child or toward future costs such as college. Men who have physical custody may still pay child support to the mother.

"Women receive child support tax free, but men can't take a tax deduction for providing it. Can you see why men might be angry about paying child support, and why women will fight not to lose it? Child support has become a secret alimony.

"Because Massachusetts does not have shared parenting legislature after divorce, visitation is often limited for the father. You have men who are obligated to pay for their

> children but have limited access to see them in a meaningful way. It's embarrassing how we trounce men and make it no better and at times worse for children of divorce.
>
> "My solution: Mandate shared parenting; use what the federal government has determined it costs to raise a child, then attach financial responsibility to each parent. It's time Massachusetts makes women and men equitable under the law.
>
> CHRISTINE ABBOTT"

While the above letter applies to the Commonwealth of Massachusetts, some of the points stated apply across the United States of America.

Note also that the petitioner has been unsuccessful to date in obtaining any justice related to his parental rights. See *Mitrano* v. *Kelly*, 123 S.Ct. 978 (2003); *Mitrano* v. *Kelly*, 123 S.Ct. 1617 (2003); *Mitrano* v. *Martin*, 123 S.Ct. 976 (2003); and, *Mitrano* v. *Kelly*, 534 U.S. 1115 (2002). Note also that the Supreme Court of the State of Vermont denied the mother attorney's fees for litigation in the State of Vermont even though the State of New Hampshire had already awarded the mother the very same attorney's fees for litigation in the State of Vermont. (A-5--A-6).

In closing, the father respectfully reminds this Court that the father has rights to raise his children free of unreasonable interference. See *Moore* v. *East Cleveland*, 431 U.S. 494, 501 (1977) (stating that child rearing decisions are entitled to constitutional protection).

2. Does Title 28, United States Code, Section 1738A preempt the State of Vermont from awarding attorney's fees for the denial of an order to enforce a child custody order (from the Commonwealth of Virginia) pursuant to Title 28, United States Code, Section 1738A?

Petitioner contends that 28 U.S.C., § 1738A preempts the State of Vermont from awarding attorney's fees. See *F.D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 127 (1974). Also see *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994) for the general rule as to the award of attorney's fees.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Vermont.

Respectfully submitted,

Peter Paul Mitrano
Pro se[1]
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

Dated: June 2003.

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1. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.

Supreme Court of the State of Vermont

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

VT. SUPREME COURT
FILED IN CLERK'S OFFICE

MAR 27 2003.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-313

MARCH TERM, 2003

Peter P. Mitrano	}	APPEALED FROM:
	}	
	}	
v.	}	Windsor Family Court
	}	
Virginia L. Kelly	}	DOCKET NO. F9-1-01 Wrdm
		Trial Judge: Paul F. Hudson

In the above entitled cause, the Clerk will enter:

Father appeals the Windsor Family Court's decision to award mother $5,354 in attorney's fees and its denial of father's motion for relief from judgment under V.R.C.P. 60(b). We remand the order on attorney's fees, stay collection of the

award, and affirm the denial of father's Rule 60(b) motion.

The present controversy arises from our August 29, 2001 remand in Mitrano v. Kelly, No. 01099. In that appeal, we affirmed the family court's dismissal of father's petition to enforce a Virginia custody decree because a New Hampshire court was properly exercising jurisdiction over the parties' custody dispute concerning their three minor children. See Mitrano v. Kelly, No. 01-099, at 2-3 (Aug. 29, 2001) (mem.). We remanded mother's cross appeal on attorney's fees to allow the trial court an opportunity to consider her request for fees under the family court's inherent authority to award attorney's fees in divorce proceedings. Id. at 3-4.

On May 27, 2002, the family court took evidence on mother's post remand petition for attorney's fees. On the day of the hearing, father moved the court for relief from the judgment dismissing his custody enforcement petition under V. R. C. P. 60(b)--the same judgment father had unsuccessfully appealed to this Court. By order dated June 1, 2002, the court awarded mother $5,354 in attorney's fees, and that judgment became final on June 14, 2002. In a separate entry order issued that day, the court summarily denied father's motion for relief from judgment. Aggrieved by the court's decisions, father timely appealed to this Court.

Father raises several reasons why we

should reverse the family court's award of attorney's fees to mother. Father first argues that the court was without authority to award mother attorney's fees because Vermont follows the American Rule on attorney's fees. He next claims the court did not have sufficient evidence before it to grant mother her fee request. Finally, father claims that the court erroneously awarded mother fees associated with the prior appeal because mother did not comply with V.R.A.P. 39(f). We address each claim in turn.

Father first asserts that the court has no authority to award attorney's fees because Vermont follows the so called American Rule, which requires each party to bear his or her own legal expenses absent a statute or contractual provision stating otherwise. Father correctly states the general rule, but he ignores our precedent allowing the family court discretion to award attorney's fees in domestic relations cases. See, e.g., Lussier v. Lussier, __ Vt. __, __, 807 A.2d 374, 378 (2002) (awarding attorney's fees in a divorce action is a matter of judicial discretion); Harris v. Harris, 168 Vt. 13, 25 (1998) (family court magistrate has discretion to award attorney's fees in an action for child support even in absence of statutory authorization). Father's first attack on the award to mother must, therefore, fail.

Father next asserts that the record lacks sufficient evidence on which to base an award of attorney's fees. Specifically, father contends that the evidence mother used to establish father's

current financial position was outdated. The key factors in determining whether to award attorney's fees in a domestic relations matter are "the ability of the supporting party to pay and the financial needs of the party receiving the award." Smith v. Stewart, 165 Vt. 364, 375 (1996). Notably, father does not claim that his financial position precludes him from being able to satisfy the award, nor does he identify as clearly erroneous any findings relating to his financial circumstances. Because father does not challenge the court's findings, those findings are binding on appeal. Bevins v. King, 147 Vt. 203, 206 (1986).

In any event, the court considered evidence of father's real property in Virginia, which was valued at approximately $700,000, his home in New Hampshire worth approximately $317,000, father's two Porsche automobiles, and his 1999 federal income tax return showing income from his law practice of $154,735 with a net profit of $24,628, among other evidence. Father did not offer any rebuttal evidence to persuade the court that his current financial circumstances differed from the circumstances suggested by mother's evidence. Because the court's findings have sufficient evidentiary support, and the findings support the conclusions, we reject father's claim that reversal is required because mother used stale information about father's financial circumstances. See LaMoria v. LaMoria, 171 Vt. 559, 561-62 (2000) (where findings are supported by credible evidence, Court will uphold legal conclusions if they have support in the findings).

Father also claims the court erroneously awarded fees related to the prior appeal in this matter because mother failed to follow the procedure set forth in V.R.A.P. 39(f) to recover such fees. We agree. In its conclusions of law, the trial court responded to father's V.R.A.P. 39(f) argument by noting that the fees at issue under our remand in the prior appeal were fees associated with work done at the trial court only. Nevertheless, in Finding No. 3, the court found that the $4,223 in fees for work by one of mother's attorneys included fees relating to work the attorney did in preparing and arguing the prior appeal. Under V.R.A.P. 39(f), a party seeking attorney's fees for work done on an appeal to this Court must file a motion in the trial court within fourteen days after we issue the mandate in the appeal. V.R.A.P. 39(f). In this case, mother filed her motion for fees long after the fourteen day period had lapsed. Therefore, mother was not entitled to an award for appeal related attorney's fees. The record on appeal does not show how much of the $4,223 award pertains to appellate work, however. We therefore remand the matter back to the trial court for a determination on the amount due mother after deducting work for the prior appeal.

Although we remand the issue of fees back to the trial court, we must address one final issue relating to the fee award. In her brief, mother claims the matter of attorney's fees is moot because the New Hampshire court subsequently awarded mother attorney's fees, including the fees at issue in the litigation here. Mother was

granted an attachment against father's real property in New Hampshire to secure payment of the sums due from father under the New Hampshire order. In his reply brief, father does not contest the factual accuracy of mother's representations about the New Hampshire judgment, including the fact that the judgment awards mother the very same fees the parties disputed before the Windsor Family Court. He asserts that mother is not entitled to collect on two judgments in different jurisdictions for the same attorney's fees.* We agree, and in the interests of comity, we stay collection on the Windsor Family Court's judgment on attorney's fees (amended in accordance with this order) pending a determination of whether those fees, or a portion thereof, have been collected pursuant to the New Hampshire order.

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* Father moved to strike portions of mother's brief and printed case, claiming that they were "unsupported by the record below in the trial court and/or inappropriate." We deny father's motion insofar as he seeks to strike text relating specifically to the New Hampshire judgment on attorney's fees and mother's attachment of father's real estate to secure the judgment. We have not considered the remaining text father seeks to strike in reaching our decision, and therefore the motion is otherwise denied as moot.

We now turn to father's claim that the family court erred by denying his motion for relief from the judgment of dismissal. Presumably, father's argument rests on V.R.C.P. 60(b)(6), which allows the trial court to relieve a party from judgment for "any other reason justifying relief from the operation of the judgment." V.R.C.P. 60(b)(6). Whether to grant relief under Rule 60(b) is a matter committed to the trial court's discretion. Richwagen v. Richwagen, 153 Vt. 1, 3 (1989). Rule 60(b) provides relief in extraordinary circumstances only, and thus does not contemplate reconsideration of matters disputed and resolved at trial. John A. Russell Corp. v. Bohlig, 170 Vt. 12, 24 (1999). We therefore require the party seeking relief to demonstrate clearly and affirmatively that the trial court withheld or abused its discretion in ruling on the motion. Richwaeen, 153 Vt. at 3-4. In this case, the trial court did not abuse its discretion by denying father's motion.

Father argues that he is entitled to relief from judgment because this Court's entry order in father's previous appeal allegedly contains numerous factual errors which, according to father, led us to erroneously affirm the trial court's dismissal of his enforcement petition. Father had an adequate opportunity to seek correction of those alleged errors, however, by pursuing relief through a motion for reargument under V.R.A.P. 40 within fourteen days after we issued the entry order on father's appeal. See V.R.A.P. 40 (party may move Court for reargument if Court "has overlooked or

misapprehended" points of law or fact "which would probably affect the result"). Father failed to take advantage of that opportunity. Father may not circumvent V.R.A.P. 40 by seeking relief in the trial court under V.R.C.P. 60(b). As we have noted on prior occasions, Rule 60(b) does not protect a party from ill-advised tactical decisions or counsel's "careless ignorance of the law." Rule v. Tobin, 168 Vt. 166, 174 (1998). Moreover, father's motion essentially restated the losing arguments he made to the trial court and this Court. Denying his motion for relief from judgment was not, therefore, an abuse of the court's discretion.

The family court's judgment awarding mother $5.354 in attorney's fees is remanded for a recalculation of fees due mother as explained herein Collection on the attorney's fee award in the family court is staved pending a determination of whether those fees, or a portion thereof, have been collected pursuant to the New Hampshire order. In all other respects, the family court's order is affirmed.

BY THE COURT:

_____/s/_____
Jeffrey L. Amestoy, Chief Justice

_____/s/_____
Denise R. Johnson, Associate Justice

_____/s/_____
Frederic W. Allen, Chief Justice (Ret.)
Specially Assigned

Supreme Court of the State of Vermont

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

VT. SUPREME COURT
FILED IN CLERK'S OFFICE

AUG 29 2001.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-099

AUGUST TERM, 2001

Peter P. Mitrano	}	APPEALED FROM
	}	
	}	
v.	}	Windsor Family Court
	}	
Virginia L. Kelly	}	
	}	DOCKET NO. 9-1 -01 Wrdm
		Trial Judge: Paul F. Hudson

In the above-entitled cause, the Clerk will enter:

Father Peter Mitrano appeals from the family court's dismissal of his action seeking to enforce a custody decree from the State of Virginia under the Parental Kidnapping Prevention Act, 28, U.S.C § 1738A(a). Mother Virginia Kelly cross-appeals, arguing the trial court erred by not awarding attorney's fees and costs. We affirm.

The following facts in the record are not disputed by father. He and mother were married and had three children together. They were divorced by an order of a Virginia court in September 1992, which granted the parties joint physical and legal custody. Both parties moved to Hanover, New Hampshire in 1993 and resided in the same household there until October 2000, not as husband and wife, however.

As father catalogued in a "notice of related matters" filed with the trial court, mother filed an emergency petition seeking custody of the parties' three children in a New Hampshire court on October 16, 2000. Mother was living in Vermont at the time she filed the petition and had been since October 6. The court granted the emergency petition with respect to the parties' daughter. Following a contested hearing on the matter in December, the court continued the temporary order with respect to the daughter, indicating it would schedule a final hearing on mother's petition.

At the end of December, father moved to Virginia with the parties' two sons without

notifying mother. Mother then sought an ex parte order from the New Hampshire court granting her temporary custody of the boys, which the court granted on January 3, 2001. Mother sought enforcement of the New Hampshire order in Virginia. Initially the Virginia court issued an order on January 4 prohibiting either party from removing the children from Virginia. The next day, the court entered an order stating that father should obey the New Hampshire order. As father concedes in his notice of related matters, the Virginia courts thereafter declined to exercise jurisdiction over the matter in response to two of father's petitions to enforce the original 1992 divorce order, deferring to the New Hampshire court. On January 10, father sought relief in the New Hampshire Supreme Court, seeking to stay the orders of the trial court and enjoin further action. The status of that action is unclear.

While the New Hampshire proceedings were pending and simultaneous with the petitions for enforcement he filed in Virginia, father also sought relief in Vermont. On January 9, he filed an enforcement action in Vermont family court under 28 U.S.C. § 1738A(a) (providing for full faith and credit for custody decrees of other states), again seeking to enforce the parties' original 1992 divorce decree. Mother filed a motion to dismiss and sought attorney's fees.

The court granted the motion to dismiss, determining that New Hampshire was properly exercising jurisdiction under the PKPA, and that the Virginia order had been superceded by the

proceedings in New Hampshire. The court determined, however, that mother was not entitled to attorney's fees under 15 V.S.A. § 1043, which governs actions brought to enforce foreign custody decrees. Father appeals and mother cross appeals.

Father argues that the trial court improperly determined that his complaint failed to state a claim upon which relief may be granted under V.R.C.P. 12(b)(6), pointing out that we must assume all of the factual allegations in his complaint are true and confine ourselves to the "four comers" of his complaint in our review. Father ignores, however, the trial court's more important determination that New Hampshire was properly exercising jurisdiction over the question of custody of the parties' children at the time he sought relief in the Vermont court. This creates a more fundamental jurisdictional problem under the PKPA. Subsection (g) of the PKPA states:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738A(g). If New Hampshire was properly exercising jurisdiction under the PKPA, the pendency of the action there would prevent Vermont from exercising jurisdiction under the statute.

Father argues, however, that the New Hampshire court was not exercising jurisdiction consistent with the PKPA because he moved to Virginia with the parties' sons on December 20, and because mother had moved to Vermont on October 6, the parties' daughter joining her following the October 16 order. He concludes that these events deprived New Hampshire of "home state" status. This argument is without merit. The PKPA provides that a state makes a custody determination consistent with the PKPA if it has jurisdiction under its own laws and "such State ... is the home State of the child on the date of the commencement of the proceeding." 28 U.S.C. 1738A(c)(1) & (2)(A) (emphasis added); see also Rocissono v. Spykes, 170 Vt. 309, 313 (2000) (PKPA's jurisdictional criteria generally should be considered with respect to circumstances existing at the time the custody proceeding is initiated). "Home state" is defined as "the State in which, immediately preceding the time involved, the child lived with his parents [or] a parent ... for at least six months." 28 U.S.C. § 1738A(b)(4). The parties and their children had been living in New Hampshire for the seven years prior to the court assuming jurisdiction on October 16, 2000, when the modification proceeding was commenced by mother's petition.' Furthermore, father stated in his filing before the trial court that Virginia – the

state issuing the original custody decree - had declined jurisdiction in favor of New Hampshire. See 28 U.S.C. § 1738A(f) (allowing modification of a custody decree from another state if the state has declined to exercise jurisdiction over modification). Therefore, the trial court properly determined that the New Hampshire court was exercising jurisdiction consistent with the PKPA.

Nevertheless, father also argues that an enforcement action is not a "custody determination" as used in the PKPA, therefore the statute does not prevent the Vermont court from exercising jurisdiction. The PKPA defines "custody determinati on" as any order, temporary or permanent that provides for the custody of a child. 28 U.S.C. § 1738A(b)(3). Furthermore, "physical custody" is defined as "actual possession and control of a child," 28 U.S.C. § 1738A(b)(7), which is exactly what father seeks through his enforcement action. Because another proceeding regarding the custody of the parties' children was pending in New Hampshire, which was exercising jurisdiction consistently with the PKPA, the trial court properly dismissed father's action seeking physical custody of the parties' children via enforcement of the parties' original Virginia divorce decree.' But see Matthews v. Rilgy, 162 Vt. 401, 408 n.9 (1994) (noting in dicta that, "[s]trictly speaking," UCCJA does not apply to contempt proceedings, even to enforce a custody decree, therefore court was not obligated to contact court of other state that had modified original custody decree which father was seeking to enforce).

With regard to mother's cross-appeal, the trial court determined that it did not have power to award attorney's fees under 15 V.S.A. § 1043(b). Mother had sought attorney's fees and costs under the section, which provides "[a] person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses." 15 V.S.A. § 1043(b). The court determined that this section was limited to the party enforcing a decree, not a party defending against an enforcement action.

On appeal, mother argues that the trial court could have alternately awarded attorney's fees under its inherent authority to do so in divorce proceedings, citing Smith v. Stewart, 165 Vt. 364 (1996) and Harris v. Harris, 168 Vt. 13 (1998). We agree and remand for a determination of attorneys fees.

Affirmed, except for the issue of attorney's fees, which order of denial is reversed and remanded.

[1] The fact that mother moved to Vermont on October 6, and the fact that the children visited with her the two weekends preceding October 16 does not change the "home state" status of New Hampshire at the time mother filed her petition seeking to modify custody. 28 U.S.C. § 1738A(b)(4) (providing that temporary absences

by the children from their home state are counted as part of the six-month period that qualifies a state as such).

[2] In light of our disposition, we need not address father's argument that "home state" jurisdiction is not necessary for the family court to entertain an enforcement action. We have previously noted, however, "requiring UCCJA jurisdiction as a predicate to enforcement would defeat the purpose of the PKPA, which mandates that all states must enforce custody determinations made consistent with PKPA requirements, regardless of whether they could exercise jurisdiction to make a custody determination." Matthews v. Rilgy, 162 Vt. 401, 414 (1994). Furthermore, because we base our decision strictly on information in father's brief and in the trial court record, we will deny father's motion to strike portions of mother's brief and supplemental printed case.

BY THE COURT:

_____/s/_____
James L. Morse, Associate Justice

_____/s/_____
Denise R. Johnson, Associate Justice

_____/s/_____
Marilyn S. Skoglund, Associate Justice

ENTRY ORDER

VERMONT SUPREME COURT DOCKET NO.
2001-099
AUGUST TERM, 2001

PETER P. MITRANO*	}	APPEALED FROM
	}	Windsor Family
v.	}	
	}	DOCKET NUMBER.
VIRGINIA L. KELLY**	}	9-1-01 Wrdm
	}	

In the above-entitled cause, the Clerk will enter:

A decision having issued in the above appeal, appellant's motion to supplement the record on appeal is denied as moot.

[ ] Publish

[x] Do Not Publish

FOR THE COURT:

_____/s/_____
James L. Morse, Associate Justice

Filed by Clerk: Jan 23, 2001

Filed by the clerk of Court May 29, 2002 Vermont Family Court Windsor County

STATE OF VERMONT
WINDSOR COUNTY, SS.

PETER P. MITRANO WINDSOR
FAMILY COURT

VIRGINIA (MITRANO) KELLY DOCKET
NO.: 9-1-O1Wrdm

OPINION AND ORDER

In this suit by the plaintiff to enforce a Virginia custody order, this courts decision on the defendants motion to dismiss and for attorneys fees was filed January 23, 2001.

By entry order filed in the Vermont Supreme Court on August 29, 2001, the denial of jurisdiction to enforce custody was affirmed, but the matter was remanded for consideration of costs and attorneys fees. Due to an appeal of the Vermont Supreme Courts decision to the United States Supreme Court proceedings were delayed. On February 12, 2002 William K. Suter, Clerk of the United States Supreme Court filed its letter indicating that the petition for the writ of certiorari had been denied.

The remand issue of cost and attorneys fees for the defendant was heard on May 27, 2002.

The plaintiff appeared and represented his interests. The defendant was present and represented by Attorney Martha Davis.

The sworn oral testimony and exhibits prove by a preponderance of the evidence as follows:

1. The defendant resides in Hanover, New Hampshire and is a nurse for Dartmouth College. She is custodian of the parties minor children Christina (16), Peter (15), and Christopher (10). Under the New Hampshire court order, the defendant is not permitted visitation at present.

2. When the plaintiff brought his action in the Windsor family court to enforce his parental rights under the Virginia order, Attorney Eileen Warshell was representing the defendant. She was too busy to take the Vermont matter, and referred the case to Attorney Martha Davis. Ms. Davis has represented the defendant throughout the Vermont proceedings.

3. To date, which includes the May 27 hearing, Attorney Davis has billed the defendant $4,223.00. The services were performed, and consisted of review of the plaintiffs enforcement motion, consultations with Attorney Warshell, preparation of the brief and printed case for the Vermont Supreme Court following this courts denial of jurisdiction. Preparation for oral argument, oral argument and travel time as well as correspondence with the client in preparation of her financial affidavit as well as representation in the May 27 hearing was billed at $200.00 per hour which the court finds reasonable for professional services fee for an attorney of the experience and competence of Martha Davis, Esquire. (Defendants exhibit A).

4. The affidavit of Attorney Elaine Warshell reflects that she billed the defendant $195.00 per hour for services. She practiced law in New Hampshire for 24 years and was of the opinion that her billing rate and fee amounts were comparable to that of other attorneys in her area who have similar experience and expertise. For her services in New Hampshire, related to the Vermont action, Attorney Warshell billed the defendant $1,131.00 which the court finds reasonable. (Defendants exhibit B). The services were in fact performed.

5. The plaintiff is an attorney practicing in Virginia. He owns two houses in Fairfax County, Virginia and one house in Hanover, New Hampshire. He also owns two Porsche automobiles, and a surburban vehicle.

6. The defendant, has as a former co-owner of the plaintiff's residence in Virginia, is of the opinion that the homes current fair market value is $545,000.00. She reviewed a comparable listing in the North Hill subdivision in Fairfax County which showed a $545,000.00 list price. (Defendants exhibit C). Based upon her opinion as a former owner (in 1992) and to a lesser extent upon the comparable listing, the court finds the defendants opinion supported. 12 V.S.A. section 1604; Albarelli v. Albarelli, 152 Vt. 46 (1989) (use of over one year old appraisals by owner).

7. The defendant is also familiar with the plaintiff's second home in Fairfax County, Virginia. In tax year 2000, its assessed value was $167,325.00. (Defendants exhibit D). The defendant relies, in part, on the tax appraisal and on her own opinion of value. Her stated opinion is found by the court to be supported. The third house owned by the plaintiff is located on 6

Stevens Road, Hanover, New Hampshire. The defendant and the parties three children lived there until two years ago and she is familiar with it. Her opinion is that its current fair market value is $317,000.00, and she relies, in part, on the Hanover tax appraisal in the amount of $317,000.00 for tax year 2000. (Defendants exhibit E). The defendants opinion of value is supported.

8. At present, the defendant is paid $500.00 per week.

9. Over the plaintiffs objection, the court admitted as evidence the plaintiffs 1996 U.S. income tax return. (Defendants exhibit G). That form shows that he received rents totaling $42,400.00 from two properties in Fairfax County, and that his net income on schedule E was slightly over $3,000.00.

10. Also over the plaintiffs objection, his 1999 federal income tax return was introduced. That reflected in schedule C $154,735.00 from his law practice with a net profit of $24,628.00. His rental properties in Fairfax County generated $16,700.00 income but deducting depreciation and expenses, showed a net loss of $18,259.00. The return also shows that over $46,000.00 in vehicle lease payments were deducted. (Defendants exhibit F, schedule C, line 20(a)).

11. The court permitted the use of the 1996 and 1999 tax returns. The plaintiff had been requested by New Hampshire counsel to supplemental his discovery answers, and he has not provided the 2000 and 2001 tax year returns.

12. During the protracted course of this litigation the defendant first had to obtain Virginia counsel when the plaintiff removed the children from New Hampshire to that state. She

incurred costs of over $10,000.00. Next, the defendant required counsel to meet the defendants cases in New Hampshire. She required representation in the initial trial which involved child custody, and she retained a separate attorney for appellate representation. $20,000.00 of attorneys fees was incurred in New Hampshire. And as previously found, she has incurred nearly $5,000.00 of attorneys fees in Vermont for the services of Attorney Warshell and Attorney Davis. Had she failed to retain counsel, the defendant would have had an unfair advantage because of his legal training, background and experience.

13. At present the defendant earns $43,000.00 per year. She is the custodial parent for the parties three minor children and rents a home in Hanover which is a lot smaller than the Hanover residence or the plaintiff's Virginia residences. The defendant owes her parents and brother-in-law funds she has either borrowed or has been loaned to defray the cost of attorneys fees. Apparently these obligations are not evidenced by promissory notes or more formal writings. They are a matter of conscience.

14. A home owned by the defendant in Vermont was sold. She realized a $5,000.00 net profit which has been expended in living expenses and attorneys fees. In addition to her family loans, she has incurred over $8,000.00 in credit card charges to meet her shortfalls in her expenses compared to her income.

15. The defendants form 813 was filed May 27, 2002. It reflects child support in the amount of $2,000.00 paid by the plaintiff plus her Dartmouth salary of $4,484.00 per month, for a total $6,484.00 of income. Her costs of health

insurance for the children is $778.00 per month, she owns a vehicle valued at $5,000.00 and owes $151.00 per month which she borrowed against her Met Life policy ($5,403.00 balance) to meet living expenses. Her housing expense is $1,100.00 per month, electricity, telephone, cooking gas, lawn care, groceries, health and dental insurance ($865.00), vehicle insurance, gasoline, registration, maintenance, uninsured medical and dental expenses, meals, clothing and hair care are found reasonable. She contributes $300.00 per month toward her IRA and she contributes $150.00 per month to her savings account. Combining her expenses and the expenses of the children, the court finds reasonable her monthly expenses in the amount of $9,420.00. This leaves a $3,000.00 monthly shortfall. She has a Paine Webber account valued at $8,190.00 which may be dwindling in value. Her Fidelity Investment account (IRA) is $8,010.00. Her Met Life account is $15,793.00 and she has borrowed over $5,000.00 against that account as discussed above. She has two Citi Street accounts with current values of $280.00 and $1,595.00 each.

16. The court finds that the defendant was required to respond to litigation brought by the plaintiff in Virginia, New Hampshire and Vermont. Further, the court finds she is in substantial need of assistance to defray the cost of attorneys to competently represent her.

CONCLUSIONS OF LAW

The plaintiffs opposition to the recovery of Ms. Davis' fees for professional service under V.R.A.P. 39 (f) is mistaken. In the plain text of

the rule it discusses "claims for attorneys fees and other non taxable expenses arising on appeal . . .". The Supreme Court mandate on this remand is to discuss trial attorneys fees.

A critical component of the courts decision on attorneys fees is ". . . the parties financial resources." Smith v. Stewart, 165 Vt. 364, 375 (1996). In this case, the defendant appears to be grossing $150,000.00 per year from his law practice, he has rental income from the other residences that he owns, he has three vehicles, and two of them are world class performance vehicles. The defendant, on the other hand, lives on $24,000.00 per year plus child support, she is in a much smaller rented residence with three children, and she drives a car with a fair market value of $5,000.00. She has borrowed substantial money from her family and friends, and has over extended herself on her credit cards to pay retainers and living expenses. In short, while the plaintiff can afford a very attractive lifestyle, his litigation that now has touched the defendant in three states has cast her into economic hardship.

The Smith holding was further discussed in Harris v. Harris, 168 Vt. 13 (1998). That holding recognizes that although express authority is not given for attorneys fees in domestic cases, there is apparently inherent authority for such an award. Harris at 25 (citing Loeb v. Loeb, 120 Vt. 489, 496 497 (1958). The Loeb decision expressed the rational that applies completely in this case, otherwise ". . . a child might be deprived of the very protection which the statute seeks to afford her." Id. at 497. In Harris, the Court again looked to the respective abilities of the parties in domestic case to bear the reasonable cost of

representation. Barring that competent representation, the defendant would have been disadvantaged by the plaintiffs legal training and experience even though he was representing himself.

Lastly, the court finds and concludes that legal services provided to the defendant in Vermont by Attorney Warshell and Attorney Davis are reasonable. Both lawyers expended substantial time defending the defendant against the plaintiffs legal actions and appeals, they are both very experienced and able counsel, they both enjoy high reputations as attorneys practicing in the Vermont Family Court, their employment involved coordinating litigation in three states for the defendant and the results they obtained for her, are, thus far, very favorable. For reasons discussed above, the defendants request for attorneys fees under the remand mandate of the Vermont Supreme Court is fully granted. Parker et als. v. Kruoinsky, 146 Vt. 304 (1985).

ORDER

Based upon the foregoing it is ordered that the plaintiff, Peter P. Mitrano, shall pay or cause to be paid to Attorney Martha Davis $4,223.00 within 60 days of the date of this order.

The court further orders that the plaintiff shall pay to Attorney Elaine Warshell the amount of $1,131.00 within 120 days of the date of this order.

Dated at Hartford, County of Windsor, State of Vermont, this 1st day of June, 2002.

_____/s/_____
Paul F. Hudson, Family Judge

STATE OF VERMONT
WINDSOR COUNTY, SS.

PETER PAUL MITRANO, Petitioner :
:
v. :
:
VIRGINIA LEE KELLY, Respondent :

VERMONT FAMILY COURT

WINDSOR COUNTY

DOCKET NO. F9- 1 -01 Wrdmd

DECISION RE: MOTION TO DISMISS AND FOR ATTORNEY'S FEES

On January 9, 2001, Petitioner Peter Paul Mitrano filed an "Emergency Petition for Enforcement of the Attached Custody Order." He seeks to enforce an Order of joint custody over the parties' three minor children, issued on September 4, 1992, by Circuit Court of Fairfax County, Virginia. (Chancery Nos. 123690 and 124672).

On January 11, 2001, Respondent Virginia Lee Kelly filed a Motion to Dismiss and for Attorney's Fees. Respondent's motion explains that more recently the parties have litigated custody issues in the Family Court in Lebanon, New Hampshire. (No. 2000-M-193). Although the procedural history is not entirely clear, it appears that (1) petitions were filed in New Hampshire

during October of 2000, (2) at that time the parties lived in New Hampshire, where they had lived for approximately seven years, (3) Judge Cyr of the New Hampshire court issued an ex parte order on October 16, 2000, granting temporary custody of one of the children to Ms. Kelly, (4) Judge Martin of the New Hampshire court held a hearing on December 14, 2000, to address issues of custody, and (5) Judge Martin of the New Hampshire court issued a decision on December 28,2000, granting temporary custody of the children to Ms. Kelly. Based on this additional information, respondent requests this court to dismiss the petition, because the Virginia Order has been superseded.

Petitioner does not deny that the New Hampshire Family Court has issued orders addressing custody. Instead, he argues that the New Hampshire orders are not entitled to full faith and credit because of failure to comply with the PKPA, 28 U. S.C. § 1738A. Petitioner stresses that respondent and the children are now living in Norwich, Vermont, and that all of the parties ceased residing in the State of New Hampshire by December 20, 2000. According to petitioner's argument, New Hampshire is thereby deprived of PKPA jurisdiction, under § 173 8A(c)(2)(A)(ii).

However, this court disagrees with petitioner's interpretation of the PKPA. "Home State" is defined as follows:

> § 1738A(b)(4). "Home State" means the State in which,

> immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, ... Periods of temporary absence of any of such persons are counted as part of the six-month period.

Based on the undisputed facts, the condition under § 1738A(c)(2)(A)(i) was met because New Hampshire was the "home state" on the date of the commencement of the proceedings. Contrary to petitioner's argument, New Hampshire was not deprived of PKPA jurisdiction merely because the parties left.

Petitioner is not entitled to enforcement of the Virginia Order, because it has been superseded by the New Hampshire Order. The court will dismiss the petition for failure to state a claim upon which relief may be granted.

Respondent also asks for attorney's fees under 15 V.S.A. § 1043. However, § 1043 applies to filing and enforcement of a custody decree of another state. Respondent has simply requested dismissal of the petition. Her motion is granted, but the court declines to award attorney's fees.

ORDER

Respondent's Motion to Dismiss is GRANTED. Respondent's Motion for Attorney's Fees is DENIED.

Dated this 23rd day of January, 2001.

_____/s/_____
Hon. Paul F. Hudson, Presiding Judge

Title 28, United States Code, Section 1738A, also known as the Parental Kidnapping Prevention Act or "PKPA"

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term-

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child; child and his parents, or the child and at least one

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting; is parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived

from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "Physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia,

the Commonwealth of Puerto Rico, or a territory or possession of the

(9) "visitation determination" means a judgment, visitation of a child and includes permanent and temporary orders and initial orders and modification faith and credit in every court within the United

(c) A child custody or visitation determination made by a court of a State is consistent with the such State; and

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the

commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (I) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B),(C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child, that such court assume jurisdiction;

or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement

of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

IN THE STATE OF VERMONT
IN THE WINDSOR FAMILY COURT

PETER PAUL MITRANO,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: F9-1-01
	)	
VIRGINIA LEE KELLY (formally Mitrano),	)	
	)	
Respondent.	)	

EMERGENCY PETITION FOR ENFORCEMENT

COMES NOW, the petitioner, Peter Paul Mitrano, *pro se*, and states his Emergency Petition for Enforcement of the Attached Custody Order as follows:

1. The petitioner, Peter Paul Mitrano, is a resident of the County of Fairfax in the Commonwealth of Virginia. The petitioner, Peter Paul Mitrano, resides at 4912 Oakcrest Drive, Fairfax, Virginia 22030.

2. The respondent, Virginia Lee Kelly (who was formerly known as Virginia Lee Mitrano) is a resident of Norwich, Vermont. The respondent, Virginia Lee Kelly, resides at Newton Lane, Norwich, Vermont 05055. The respondent,

Virginia Lee Kelly, receives mail at the address of Post Office Box 1248, Norwich, Vermont 05055.

3. The petitioner, Peter Paul Mitrano, and the respondent, Virginia Lee Kelly were previously married and are now divorced. *See* Chancery Numbers 123690 and 124672 from the Circuit Court of Fairfax County, Virginia.

4. The petitioner, Peter Paul Mitrano, and the respondent, Virginia Lee Kelly Mitrano had three children during their marriage: Christina Lee Mitrano (now age 15), Peter Paul Mitrano (now age 14) and Christopher Louis Mitrano (now age 9).

5. On Thursday, January 4, 2001, the defendant, Virginia Lee Kelly Mitrano attempted to take Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) out of school in Fairfax, Virginia to Vermont based upon an ex parte order from the State of New Hampshire. Later in the day on Thursday, January 4, 2001, the defendant, Virginia Lee Kelly Mitrano attempted to take Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) from their home at 4912 Oakcrest Drive, Fairfax, Virginia. See the attached order from the State of New Hampshire. After the petitioner produced Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) for visitation in Fairfax, Virginia, the respondent failed to return the children to petitioner in accordance with the attached custody Order of the Circuit Court of Fairfax County, Virginia. Said custody Order of the Circuit Court of Fairfax County, Virginia has also been registered in the State of New Hampshire, Judicial Branch, Family Division at Lebanon.

6. The petitioner denies that the State of New Hampshire has jurisdiction to determine custody of said children pursuant to Title 28 of the United States Code, Section 1738A. Petitioner further states that as of the end of the day of December 20, 2000, neither the petitioner, respondent nor any of the parties' children have lived in the State of New Hampshire. *See* Title 28 of the United States Code, Section 1738A. Petitioner further states that the respondent has been a resident of Town of Norwich in the State of Vermont since on or about October 1, 2000. Since October 6, 2000, the children have lived with the respondent in the State of Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, prior to the date of a filing of petition to modify a custody order in the State of New Hampshire which was October 16, 2000 and on October 16, 2000, the children were living in both the State of Vermont and the State of New Hampshire. The petitioner has been a resident of the Commonwealth of Virginia since December 21, 2000. Peter Paul Mitrano (age 14) and Christopher Louis Mitrano (age 9) have been residents of the Commonwealth of Virginia since December 21, 2000 until they were taken away today, January 8, 2001, by the respondent. Accordingly, because there is and has been no contestant nor child living in the State of New Hampshire since the end of the day of December 20, 2000, the State of New Hampshire does not

have jurisdiction to even consider making a modification of the existing custody Order of the Circuit Court of Fairfax County, Virginia for said children pursuant to Title 28 of the United States Code, Section 1738A. *Also see* the attached permanent custody Order of the Circuit Court of Fairfax County, Virginia from 1992 that has remained in effect since 1992. *Also see* Code of Virginia, Section 20-108 providing for continuing jurisdiction of the Circuit Court of Fairfax County, Virginia to change or modify said attached permanent custody Order of the Circuit Court of Fairfax County, Virginia. *Arguendo*, even if the State of New Hampshire were to have jurisdiction to modify the attached permanent custody Order of the Circuit Court of Fairfax County, Virginia, any orders from the State of New Hampshire that are ex parte orders wherein no notice whatsoever was given to petitioner (including petitioner's attorney located in the State of New Hampshire) nor where no opportunity to be heard was given petitioner are unenforceable outside the State of New Hampshire pursuant to Title 28 of the United States Code, Section 1738A.

7. Based upon information and belief, the children Christina Lee Mitrano (now age 15), Peter Paul Mitrano (now age 14) and Christopher Louis Mitrano (now age 9) are located at the home of the respondent, Virginia Lee Kelly at Newton Lane, Norwich, Vermont 05055

8. WHEREFORE the petitioner, Peter Paul Mitrano, *pro se*, respectfully requests that this Honorable Court enforce the attached permanent custody Order of the Circuit Court of Fairfax County, Virginia and further order that

the children of the parties: Christina Lee Mitrano (now age 15); Peter Paul Mitrano (now age 14); and, Christopher Louis Mitrano (now age 9) be immediately returned to the petitioner, Peter Paul Mitrano.

Respectfully requested,

_____

Peter Paul Mitrano
Pro se
4912 Oakcrest Drive
Fairfax, Virginia 22030

(703) 591-7250

Petitioner

Dated: January 8, 2001.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PETER PAUL MITRANO

Plaintiff/Cross-Defendant

v. In Chancery No.
123690
124672

VIRGINIA LEE KELLY MITRANO

Defendant/Cross-Plaintiff

ORDER

THIS CAUSE came to be heard on the 6th day Of July 1992, upon the cross Motions of Plaintiff and Defendant for entry Of an order granting each of them sole custody of their minor children, and appropriate visitation to the other party. Both parties having been present in court with their counsel.

IT APPEARING TO THE COURT that there were three (3) children born of this marriage, to-wit: CHRISTINA LEE MITRANO, born on the 4th day of October 1985 (6 years); PETER PAUL MITRANO, born on the 27th day of December 1986 (5 years); and CHRISTOPHER LOUIS

MITRANO born on the 21st day of December 1991 (6 months); and

IT FURTHER APPEARING TO THE COURT after hearing testimony of the parties, their witnesses, and upon the argument of counsel, that the following is an appropriate order to be, entered in this cause, it is therefore

ORDERED that Plaintiff, Peter Paul Mitrano, (Peter), and Defendant, Virginia Lee Kelly Mitrano (Virginia), shall have joint physical and legal custody of their minor children, to-wit: CHRISTINA LEE MITRANO, PETER PAUL MITRANO and CHRISTOPHER LOUIS MITRANO, and it is further

ORDERED that the minor children of the parties shall reside primarily with Peter, and the minor children shall be with their mother on each Wednesday from 5:00 p.m. until 8:00 p.m., for dinner, and the first three weekends of each month beginning at 6:00 p.m. on the first Friday of each month continuing until Monday at 9:00 a.m., or when school begins, whichever is most appropriate under the circumstances, [the parties agree to re schedule in the event of changes to the schedule to their satisfaction] and it is further

ORDERED that in addition to the time set forth above, Peter and Virginia shall have the children with them the following times (these times shall supercede the times immediately set forth above in the event of a conflict):

(a) Christmas: Unless Peter takes the children on vacation during the Christmas holiday, which would be for a maximum of one weeks time, the minor children will spend the day of Christmas Eve, Christmas Eve and Christmas morning until 10:00 a.m. with Peter, and from 10:00 a.m. Christmas Day until 10:00 a.m. on New Years Day with Virginia. For the rest of the Christmas break, both before Christmas and after New Years, the minor children will be with Peter; except, the minor child, PETER PAUL MITRANO, shall celebrate his birthday with Peter on the actual day it falls.

(b) Easter and Thanksgiving: The minor children of the parties will be with Virginia on Easter weekend [& Spring Break, unless Peter takes the children on vacation and gives 30 days notice to Virginia of his intention to take the children for the vacation] and they will be with Peter on Thanksgiving and the three days following Thanksgiving.

(c) Mothers and Fathers Day: The minor children of the parties will spend time with the appropriate parent on the appropriate parent's day.

(d) Birthdays: Two of the minor children of the parties, CHRISTINA LEE MITRANO and CHRISTOPHER LOUIS MITRANO, will celebrate their birthdays in whichever parents home they may be in on the specific date of their birthday. For all three children, the parent with whom they are not with at that particular time, will be invited

to participate in the birthday celebration. In addition, each parent will have the right to be with the children, for an appropriate period of time under the particular circumstances as they exist, on their own particular birthdays.

(e) Summer Vacation: The parties will add the number of days between the end of school and the beginning of the next school year and divide by 2; Virginia shall have the first half of the summer and Peter shall have the second half of the summer. So long as each of the parties remains in the Washington Metropolitan Area during their summer time with the children, the other patty shall have rights to reasonable time to spend with the minor children; and it is further

ORDERED that each party shall have equal access to medical records, consultations with physicians regarding the medical condition of the children, and school records of the minor children of the parties. In the event that either party shall obtain a document pertaining to the medical condition of the children, or school report cards, a copy of that document shall be provided to the other parent; and it is further

ORDERED that each of the parties shall consult with each other with regards to all major decisions made for the benefit of the children. In the event they are unable to agree, then they shall consult with Dr. Jeffrey Schulman, or some other agreed upon third person; and it is further

ORDERED that each of the parties shall participate in a seminar or course consisting primarily of receiving training in the art of mediation, and it is further

ORDERED that in the event the parties cannot reach a consensus on decisions regarding the welfare of the children, then the particular parties' area of responsibility for decision making' shall be as follows: Virginia shall have decision making powers in the areas of recreational and social activities, hobbies (all non-school related) and health. Peter shall have decision making powers in the areas of the minor children's' education and religious upbringing and training.

ENTERED this 4 day of September 1992.

_____/s/_____
ROSEMARIE ANNUNZIATA, JUDGE

Smolen & Plevy P.C.

_____/s/_____
Alan B. Plevy, Esquire
1045 Leesburg Pike/750

Vienna, Virginia 22182
Counsel for Peter Paul Mitrano
VA Bar # 017165
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Shoun Smith & Bach P.C.

_____/s/_____
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Virginia Lee Kelly Mitrano